United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 22, 2004

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Haskell Site Work, LLC 590-2525-6700
Case 4-CA-32477

This Section 8(a)(2) case was submitted for advice on whether the Employer unlawfully entered into a Section 8(f) agreement as part of an overall plan to stymie the organizing efforts of a rival union.

We conclude, in agreement with the Region, that the Employer's 8(f) agreement was lawful because the unlawful assistance given to the signatory Union occurred well after the Employer had already executed the agreement.

FACTS

Since 1993, Joseph Filoon and his partner have owned Shoreline Grading (Shoreline) which employs equipment operators and laborers to perform street and landscaping improvement work. Shoreline was signatory to a series of jobsite agreements with Operating Engineers Local 825. Local 825 sought to expand its relationship with Shoreline into a full-scale Section 8(f) bargaining relationship. Filoon did not want a full relationship with Local 825 because its bargaining agreement would not allow Filoon to use his employees across traditional craft lines.

In the fall of 2002, Filoon and his partner acquired Haskell Excavation which at the time was nonoperational but signatory to a Section 8(f) agreement with the Steelworkers. Filoon acquired Haskell because its Steelworkers bargaining agreement did permit the use of employees across traditional craft lines. In around October 2002, Filoon assumed the Steelworkers agreement and created Haskell Site Works (Haskell). Filoon designated Haskell as his Union signatory company for the purpose of bidding on public jobs requiring the payment of prevailing rates. Filoon designated Shoreline as his private, non-union operation.

Filoon first used Haskell and its Steelworkers agreement in July 2003 when Filoon began performing a prevailing rate job in Wildwood, NJ. Although Filoon used Haskell's name on the Wildwood project, Filoon actually

used Shoreline employees and Shoreline supervisors. Two Shoreline supervisors distributed Steelworkers authorization cards to the employees, telling them that they had to sign in order to work on prevailing rate projects. The name of the employer was blank on these cards when the employees signed them. The Region has concluded that Haskell/Shoreline violated Sections 8(a)(2) and (3) by soliciting and obtaining by threats Steelworker authorization cards, and then deducting and forwarding Steelworker dues, all prior to the seven-day grace period of the union-security clause in the Steelworkers bargaining agreement.

Thereafter, whenever Filoon employees worked on prevailing rate jobs, Filoon "employed" them as Haskell employees, paid them under the Steelworkers agreement, and deducted and forwarded Steelworker dues. Whenever these same employees worked on private jobs, they were "employed" by Shoreline, received Shoreline's lower wages and benefits, with no dues deducted. Besides sharing employees and owners, Haskell/Shoreline also share office space and legal representation. The Region has concluded that Haskell and Shoreline are alter egos.

On December 16, 2003, five Haskell/Shoreline employees met with Local 825 organizers at a local diner and signed Local 825 authorization cards. During this meeting, Filoon entered the diner, sat direct adjacent, and glared at the attending employees. The next day, Filoon discharged three of these employees telling two of them they were discharged for what they had done to him the previous night. The Region has concluded that these December discharges violated Section 8(a)(3).

ACTION

The Employer's 8(f) agreement was lawful because the unlawful assistance given to the Steelworkers occurred after both parties had already executed their agreement.

Section 8(f) privileges a union and an employer primarily in the construction industry to enter into a prehire bargaining agreement. 8(f) bargaining agreements must be entered into voluntarily, absent any coercion.[1]

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[1] NLRB v. Iron Workers Local 103 (Higdon Contracting Co.), 434 U.S. 335, 348 n.10 (1978). This requirement was reaffirmed in John Deklewa & Sons, 282 NLRB 1375, 1381, 1384-85 (1987).

Unlawful Section 8(a)(2) assistance also precludes the finding of a valid 8(f) agreement.[2]

The Board has found 8(f) agreements to be invalid where they were entered into as a result of employer unlawful assistance such as coercing employees to join the union, or soliciting membership on behalf of the union.[3] The Board has also precluded the application of 8(f) where the employer engaged in unlawful assistance by granting exclusive 8(f) recognition to a second union at a time when there existed a rival union which either was also claiming exclusive Section 9(a) recognition, or was already representing the employees in an exclusive Section 9(a) majority relationship.[4] However, the Board has not found an 8(f) contract to be invalid where Section 8(a)(2) unlawful assistance occurred wholly after the parties had already executed the agreement:

> [We] do not read Section 8(f) as permitting, much less as requiring, the invalidation of a prehire contract, allowable under that Section and valid when entered into, simply because of *subsequent* acts of unlawful assistance for which the employer party to the contract has alone been found responsible . . . Section 8(f), it is true, imposes as one of its conditions that an employer may "make" such an agreement only with a labor organization "not established, maintained, or assisted by any action defined in Section 8(a) of the Act as an unfair labor practice." That condition, however, speaks only as of

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[2] Section 8(f) itself provides that a prehire agreement must be with a union that is "not established, maintained, or assisted by any action defined in section 8(a) of the Act as an unfair labor practice..."

[3] See Bell Energy Management Corp., 291 NLRB 168 (1988) (initially contacting union, soliciting employee attendance at union organizing meeting, and making premises available to union, all while employer already bound to a Section 9(a) agreement with another union); Precision Carpet, 223 NLRB 329, 340 (1976) (threatening employees with discharge); Bear Creek Constr. Co., 135 NLRB 1285 (1962) (soliciting membership applications and checkoff forms).

[4] See Barney Wilkerson Constr. Co., 145 NLRB 704 (1963) (extending 8(f) recognition while rival union claiming exclusive recognition); Oilfield Maintenance Co., 142 NLRB 1384 (1963) (extending 8(f) recognition while employees already accorded exclusive 9(a) representation by other union); Bell Energy Management Corp., supra.

> the time of the making of the contract and obviously refers to antecedent unfair labor practices.[5] (Emphasis in original).

In the instant case, Haskell lawfully executed the Union's 8(f) agreement in October 2002. Many months later in July 2003, Haskell unlawfully assisted the Union by obtaining Union authorization cards from employees and deducting Union dues under these unlawfully obtained cards, all before the seven-day period in the contract's union-security clause. This unlawful assistance well post-dated Haskell's execution of the 8(f) agreement. We therefore find that the agreement remained valid.[6]

We would not argue that the agreement was invalid based on the theory that Haskell's initial execution of the 8(f) agreement was part of an overall unlawful scheme to acquire Haskell Excavation in order to stymie the organizing efforts of Local 825. We conclude that Disney Roofing[7] does not support such a theory but rather involved substantial employer assistance before execution of the 8(f) agreement.

The employer in Disney Roofing employed members of the carpenters union and roofers union. The employer was not signatory to the association bargaining agreements with those two unions but generally observed those association agreements. The employer formed a new corporation and signed a Section 8(f) agreement with the mineworkers union because that agreement, unlike the association agreements with the carpenters and roofers, allowed the employer to work all its employees across traditional trade lines on different jobs. The employer transferred all employees from its former companies to the new company and began operating under the mineworkers agreement.

A few weeks before the employer executed the mineworkers agreement, it unlawfully solicited mineworkers authorization cards from two of its employees. A few months after it had executed the 8(f) agreement, the employer unlawfully solicited mineworker cards from two additional employees. The employer deducted and forwarded

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[5] Zidell Explorations, Inc., 175 NLRB 887, 888 (1969). See also Luke Construction Co., 211 NLRB 602, 605 (1974)(post 8(f) contract assistance not valid basis for ordering withdrawal of recognition or rescission of otherwise valid 8(f) agreement).

[6] Zidell Explorations and Luke Construction, supra.

[7] Disney Roofing and Materials Co., 145 NLRB 88 (1963).

dues pursuant to these unlawfully obtained authorization cards. The ALJ, adopted by the Board, found that the employer's solicitation of the mineworkers cards and deduction of mineworker dues all violated Section 8(a)(2). The ALJ then found the mineworkers 8(f) agreement invalid because it was "established, maintained or assisted" by the 8(a)(2) violations.

We recognize that the invalid nature of the 8(f) agreement in Disney Roofing was arguably based upon the employer's entire course of conduct designed to avoid two other unions.[8] Similarly here, Filoon and his partner arguably acquired Haskell Excavation and adopted its 8(f) agreement for the purpose of avoiding the organizing efforts of Local 825. However, the ALJ in Disney Roofing found substantial unlawful assistance prior to the employer's execution of the mineworkers agreement. That unlawful assistance alone was sufficient to make the subsequent mineworkers agreement invalid.[9] Therefore, the Region should dismiss this case, absent withdrawal.

B.J.K.

[8] The ALJ found it "uncontradicted that Disney initiated this scheme to obviate dealing with the individual craft unions . . ." Id at 91, note 3.

[9] Zidell Explorations, supra. See also Central Mechanical Constr. Co., Inc., Case 17-CA-18281, Appeals Minute dated April 30, 1996 (8(f) contract found invalid solely because of Section 8(a)(1) and (3) violations committed before the 8(f) contract was executed, and not because of Section 8(a)(2) and (3) violations committed post-contract execution.)